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UNCLAS NAIROBI 001210

STATE FOR EEB/IFD/OIA HEATHER GOETHERT AND KIMBERLY BUTLER, AND
L/CID PATRICK PEARSALL

STATE ALSO FOR AF/E AND AF/EPS

USDOC FOR 3131/USFCS/OIO/RD/ANESA

SIPDIS

SENSITIVE

E.O. 12958: N/A

TAGS: [KIDE](#) [EINV](#) [OPIC](#) [CASC](#) [PGOV](#) [KE](#)

SUBJECT: 2009 REPORT ON INVESTMENT DISPUTES AND EXPROPRIATION CLAIMS
- KENYA

REF: STATE 49477

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¶1. (U) The U.S. Mission in Kenya is aware of one (1) outstanding claim of a United States business interest against a branch of the Government of Kenya (GOK).

¶2. (U) Background: In the mid-1990s, Claimant A entered into a partnership with a Kenyan public university ("the university"), via a Memorandum of Agreement (MOA), to establish computer instruction centers. This partnership sought to impart computer skills to Kenyan students and over the years expanded to several centers across the country, using U.S. expertise, intellectual property, and technology supplied by Claimant A to staff and run the curriculum.

¶3. (SBU) According to Claimant A, the partnership ran successfully for seven years when, in June 2003, the university, citing management irregularities, unilaterally took over the entire enterprise. Though the university agreed in principle to proceed to arbitration, as provided for by the MOA that established the partnership, the arbitration process has yet to commence, despite the significant efforts that U.S. Embassy officers, including the previous U.S. Ambassador and several Senators and Members of Congress have expended in pursuit of a satisfactory resolution since the management takeover.

¶4. (SBU) At the time of the university takeover, Claimant A contends it had invested approximately KSh 35 million (USD 500,000), but had only recouped about 50% of this amount. Furthermore, Claimant A estimates a loss of investment in excess of USD 5 million when projected revenues are considered and also estimates that the university is currently collecting in excess of KSh 100 million (USD 1.43 million) annually from the IT Learning Center, based at its campus in Juja Town, and from 16 other accreditation centers in Nairobi. Finally, according to Claimant A, the university has also set into motion plans to develop a technology park, a project concept that had been envisioned for implementation at some later phase within the spirit of the joint MOA. Claimant A asserts that the university needs to reverse its suspension of the MOA or provide financial compensation.

¶5. (SBU) U.S. Mission Actions on Behalf of U.S. Claimant: In June 2003 Claimant A formally sought U.S. Embassy Nairobi intervention in its dispute with the Kenyan university, citing a unilateral breach of the parties' MOA and claiming that Claimant A's interest in the partnership had been expropriated. Subsequently, Embassy officials

contacted GOK counterparts on Claimant A's behalf and persuaded the university to submit the case to arbitration, as agreed in the MOA. The Embassy has also signaled to the GOK the desirability of an early and, if possible, amicable settlement of this dispute on many occasions. To date, Claimant A has refused to engage local counsel or pursue this case in the Kenyan legal system. Claimant A has also refused to accept the university's offer of arbitration under the MOA's terms.

¶16. (SBU) As part of a March 20, 2007 conference call, Claimant A's president requested that the U.S. Ambassador intervene in the matter. Claimant A's local representative also participated in the conference call. In response, on April 24, 2007, the Ambassador wrote to the Kenyan Minister of Education, requesting the reinstatement of the MOA by the Kenyan university. A copy of this letter was also sent to the then Minister of Internal Security because Claimant A's president believes the former Internal Security Minister can assist in facilitating a decision that would bring both parties closer to a negotiated resolution. U.S. Embassy Foreign Commercial Service (FCS) officers have followed up with contacts in both the Education and Internal Security ministries but have yet to receive a concrete reply to the Ambassador's letter. U.S. Embassy officers have met and corresponded with Claimant A's local representative on several occasions.

¶17. (SBU) On July 11, 2007, Claimant A's president contacted U.S. Embassy FCS following an "East African Standard" article alleging corruption at the university. U.S. Embassy Charg d'Affaires spoke with Claimant A's president on July 12 and held a follow-up meeting with Claimant A's representative in Kenya on July 13. The Charg d'Affaires reiterated that, while the U.S. Embassy would continue to seek a negotiated political solution to this dispute, Claimant A ought to pursue local legal remedies and/or international

arbitration, which Claimant A has thus far refused to do.

¶18. (SBU) On September 10, 2007, Claimant A's president held a conference call with then Acting Deputy Chief of Mission (DCM) and FCS staff, during which he indicated that he no longer wished to pursue a negotiated solution to his claims against the university. Claimant A's president requested a determination by the USG that his assets had been expropriated. In a September 21, 2007 letter from the Ambassador to Claimant A's president, and a subsequent conference call involving both parties on October 4, 2007, the Ambassador reviewed USG policy on expropriation in detail to Claimant A. The Ambassador explained that U.S. investors must exhaust all local remedies or prove the futility of pursuing such remedies prior to claiming expropriation. Since the October 4, 2007 conference call with the Ambassador, Claimant A's president has to date neither initiated local legal action to seek redress or initiated international arbitration, nor initiated negotiations with the University to reach a settlement. (U.S. Embassy officers continue to maintain regular contact with Claimant A's local representative).

¶19. (SBU) On May 14, 2008, the DCM sent Claimant A's president a letter clarifying that the Counselor for Commercial Affairs is Claimant A's principal point of contact. The DCM asked that Claimant A henceforth communicate any changes in this case to the Foreign Commercial Section of the Embassy.

¶110. (SBU) On July 21, 2008, the Claimant wrote to inform the new vice chancellor of the university, Prof. Mabel Imbuga, of his decision to pursue arbitration as provided by the MOA, with a proposal that the arbitration process begin on August 12, 2008, at a mutually acceptable time and venue in Nairobi. In anticipation of a positive response from the university, Claimant A's president traveled to Kenya to participate in the arbitration. Unfortunately, the university failed to respond to Claimant A's offer.

¶111. (SBU) Embassy representatives met with Claimant A's president in September 2008, when they learned that Claimant A's president and local representative had met with the university's vice chancellor in August and again on September 1, 2008. According to Claimant A, the university vice chancellor committed herself to provide a response after a university council meeting to be held on September 17, 2008. Alas, she has not done so to date.

¶12. (SBU) During his visit to Kenya, Claimant A's president also met on August 11, 2008 with the Kenyan deputy prime minister/minister of trade (currently minister of finance) to discuss the case. On September 5, 2008, the Ministry of Trade's permanent secretary wrote the university's vice chancellor to ask the university to seek an amicable solution in keeping with the government's efforts to increase joint ventures and public-private partnerships. According to Claimant A, the university has to date failed to respond to the deputy prime minister's instructions.

¶13. (SBU) While Claimant A has yet to pursue legal remedies, Post learned from Claimant A that the university's former vice chancellor filed a lawsuit against Claimant A and others on December 15, 2005. In his suit, the plaintiff alleged that Claimant A, Claimant A's president and its local representative, and the university's deputy vice chancellor had entered into a conspiracy to defraud the university.

¶14. (SBU) At a May 13, 2008 hearing, the court ruled in favor of the defense and supported a counterclaim filed by Claimant A and its president. The court set aside an earlier judgment that Claimant A had been properly served with a summons by the plaintiff.

¶15. (SBU) At the May 13, 2008 hearing, Claimant A's local representative also applied to the court for a dismissal of the suit against Claimant A and its partners. The court has yet to deliver a ruling which was originally set for November 7, 2008.

¶16. (SBU) Claimant's Name:

Claimant A: Nebraska-based Micro-Mini Systems (MMS)

University: Jomo Kenyatta University of Agriculture and Technology (JKUAT)

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